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4 JH KELLY, LLC,  
5 Plaintiff,  
6 v.  
7 AECOM TECHNICAL SERVICES, INC.,  
8 Defendant.

9 Case No. 20-cv-05381-HSG

10 **ORDER DENYING MOTION FOR  
11 LEAVE TO FILE A MOTION FOR  
RECONSIDERATION**

12 Re: Dkt. No. 234

13 JH Kelly, LLC (“JH Kelly”) asks the Court for leave to file a motion to reconsider its  
14 Order granting AECOM’s Motion for Partial Summary Judgment. Dkt. Nos. 229 (“Order”), 234  
15 (“Mot.”). Civil Local Rule 7-9(b)(3) allows a party to seek reconsideration of an order if the court  
16 manifestly failed to consider material facts or dispositive legal arguments. JH Kelly contends that  
17 the Court did so when it granted summary judgment on JH Kelly’s claims for labor and material  
18 furnished through September 12, 2018. *See* Order at 10-15. The Court largely disagrees and  
19 **DENIES** JH Kelly’s motion, except for the limited issue identified below.

20 The Court will not repeat the full underlying facts and procedural posture of this motion  
21 and instead refers the parties to its previous Order. Basically, the Court found that JH Kelly  
22 waived all its claims for labor and material furnished through September 12, 2018 by executing a  
23 document that said “[T]his document will become effective to release and relinquish pro tanto any  
24 and all claims and lien rights [JH Kelly] may have for and in connection with the above-referenced  
25 project for said labor performed and materials furnished through such date.” *See* Order at 10-15.  
26 JH Kelly claims that, in so holding, the Order “failed to consider” four categories of arguments.  
27 The Court will briefly address JH Kelly’s contentions below, but the short of it is that JH Kelly  
28 simply disagrees with the Court’s legal analysis, which is not an appropriate basis for seeking

1 reconsideration. *See Campbell v. City of Milpitas*, No. 13-CV-03817-BLF, 2015 WL 3396809, at  
2 \*5 (N.D. Cal. May 22, 2015) (“At the end of the day, Plaintiffs simply disagree with the Court’s  
3 legal analysis, which is not an appropriate basis for seeking reconsideration.”).

4 JH Kelly first argues that the Court “failed to consider the Conditional Partial Lien Waiver  
5 as a whole, including the title (‘Conditional Partial Lien Waiver’) and the use of the term ‘Lien  
6 Waiver’ in the first sentence.” Mot. at 4. This is wrong. The Court was aware of the document’s  
7 title and repeatedly referred to it as either a “lien waiver” or a “partial lien waiver.” *See, e.g.*,  
8 Order at 11 (“Instead of using the form lien waivers required by California law, however, JH Kelly  
9 repeatedly sent its own lien waivers along with its invoices.”); *id.* at 13 (“JH Kelly makes two  
10 attempts to limit the effect of its partial lien waivers.”). To the extent JH Kelly contends that a  
11 document titled a lien waiver cannot release claims other than lien claims, the Court disagrees, and  
12 the Order cited authority to the contrary. *See id.* at 12, n.7.

13 Second, JH Kelly argues that the Court “failed to consider extrinsic evidence  
14 demonstrating that the parties did not intend or understand the Conditional Partial Lien Waiver to  
15 constitute a release of all claims for labor and materials furnished through September 12, 2018.”  
16 Mot. at 4. But to begin, the Court was not required to consider extrinsic evidence because, as  
17 shown below, it made a finding based on the clear and plain language of the Conditional Partial  
18 Lien Waiver:

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20 This Court concurs and finds as a matter of law that the clear and plain  
language of JH Kelly’s waiver releases “any and all claims” for labor  
and materials through the release date. This outcome is consistent  
with California law, under which written contracts are generally  
governed by their plain terms, and written release agreements bar any  
claim covered by the release’s terms, absent evidence of fraud,  
deception, misrepresentation, duress, or undue influence.  
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24 Order at 12. Again, this finding is consistent with California’s “objective theory of contracts,”  
25 under which “it is the objective intent, as evidenced by the words of the contract, rather than the  
26 subjective intent of one of the parties, that controls interpretation,” and under which “[t]he parties’  
27 undisclosed intent or understanding is irrelevant to contract interpretation.” *Reilly v. Inquest*  
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1        *Tech., Inc.*, 218 Cal. App. 4th 536, 554, 160 Cal. Rptr. 3d 236, 249 (2013) (cleaned up).<sup>1</sup>

2            And in any event, it is unclear what “extrinsic evidence” JH Kelly thinks the Court should  
3 have considered but failed to. Its present motion argues that the Order “gives only passing  
4 consideration to AECOM’s January 3, 2022 payment of \$11,000,439.28, more than \$10 million of  
5 which was for amounts presumably waived based on the Court’s interpretation of the September  
6 19, 2018 Conditional Partial Lien Waiver.” Mot. at 4. This argument acknowledges that the  
7 Court considered the impact of AECOM’s untimely payment. But unlike JH Kelly, the Court  
8 found it dispositive that “nothing in the waivers or the Subcontract says that untimely payment  
9 renders JH Kelly’s waivers unenforceable.” Order at 13. JH Kelly did not present any other  
10 “extrinsic evidence” in its Opposition and certainly cannot do so now on reconsideration. *See*  
11 *Iglesia Ni Cristo v. Cayabyab*, No. 18-CV-00561-BLF, 2020 WL 3833281, at \*4 (N.D. Cal. July  
12 8, 2020) (“And, because the asserted judicial admissions were not brought to the Court’s attention  
13 previously, there was no ‘manifest failure’ to consider them, as required under Rule 7-9(b)(3 ).”)  
14 (N.D. Cal. July 8, 2020).

15            Of course, JH Kelly may disagree with the Court’s ruling, and its position is preserved for  
16 appeal. But nothing in its motion persuades this Court to revisit this issue. *See Rupert v. Bond*,  
17 No. 12-CV-05292-BLF, 2015 WL 78739, at \*2 (N.D. Cal. Jan. 6, 2015), *aff’d*, 771 F. App’x 777  
18 (9th Cir. 2019) (“A manifest error of law is not merely one in which the party disagrees with the  
19 Court, but instead is the wholesale disregard, misapplication, or failure to recognize controlling  
20 precedent on the part of the court.”) (citations omitted).

21            Third, JH Kelly argues that the Order “also acknowledged that the ‘pro tanto’ language in  
22 the Conditional Partial Lien Waiver was ambiguous on its face, but it failed to undertake any  
23 analysis to resolve the ambiguity.” Mot. at 4. This is also wrong. The Court did not find the “pro  
24 tanto” language to be ambiguous. It instead explained, as the *Halbert’s Lumber* court did, that the  
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26        <sup>1</sup> *See also* Cal. Civ. Code § 1639 (“When a contract is reduced to writing, the intention of the  
27 parties is to be ascertained from the writing alone, if possible[.]”); *Appling v. State Farm Mut.  
28 Auto. Ins. Co.*, 340 F.3d 769, 777 (9th Cir. 2003) (“If the court finds that the contract is not  
susceptible to alternative meanings, then it may proceed to determine the issue based on the plain  
meaning of the contract language.”).

1 “pro tanto” language was not particularly relevant to the question at hand, which was what, if  
2 anything, limited the scope of JH Kelly’s waivers:

3                   Contrary to JH Kelly’s view, the Court does not find the “pro tanto”  
4 language in the waivers to be very helpful. Pro tanto is a Latin phrase  
5 that means “only to that extent,” or more colloquially, “as far as it  
6 goes.” *Halbert’s Lumber, Inc. v. Lucky Stores, Inc.*, 6 Cal. App. 4th  
7 1233, 1247, 8 Cal. Rptr. 2d 298, 306 (1992). So when a waiver  
releases claims pro tanto, to emphasize the words “pro tanto” is  
simply to beg the question: “For so much as what? For as much as  
what may be? As far as what goes?” *Id.*

8 Order at 14, n.9. The Court reviewed the waivers and found “that the scope of JH Kelly’s  
9 releases, by their plain terms, are only limited by the effective date, not by the amount of  
10 corresponding payment.” Order at 13-14. Here again, nothing in JH Kelly’s motion persuades the  
11 Court to revisit this issue.

12                   Relatedly, JH Kelly claims that the Order failed to consider *Supreme Foodservice GmbH v.*  
13 *Fluor Intercontinental, Inc.*, No. 2:11-CV-08803-SVW-FFM, 2013 WL 12122579 (C.D. Cal. Jan.  
14 15, 2013), in which a district court held that a waiver that released *pro tanto* both lien claims and  
15 non-lien claims was effective to release the non-lien claims only to the extent of payment. Mot. at  
16 5. But JH Kelly cites no authority for the proposition that a district court’s decision not to  
17 consider an unpublished, non-binding decision from another district court warrants the  
18 “extraordinary remedy” of reconsideration, and the Court is aware of none. *See Kona Enters. v.*  
19 *Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000).

20                   Fourth, JH Kelly argues that the Order “incorrectly concluded that AECOM’s January 3,  
21 2022 payment of the September 19, 2018 invoice (which was only partially paid, considering the  
22 accrued interest) was only four days late,” when the payment “was actually more than three years  
23 past due under the Subcontract, which required AECOM to pay Kelly no later than 30 days of the  
24 invoice date.” Mot. at 6. JH Kelly also argues that the Order “disregarded that the lengthy delay  
25 in payment also violated California’s prohibition on pay-if-paid provisions or pay-when-paid  
26 provisions that unreasonably delay payment.” *Id.*

27                   To begin with, the first point mischaracterizes what the Order actually said. The Order  
28 said that AECOM’s January 3, 2022 payment was four days late in response to JH Kelly’s

1 argument that that payment “also was likely not timely under Subcontract section 7.2.1, which  
2 requires payment within *seven days after AECOM was paid by PG&E.*” Dkt. No. 226 at 15  
3 (emphasis added). JH Kelly then explained the following:

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5 On January 14, 2022, AECOM’s counsel stated that AECOM  
6 received payment from PG&E on or around December 24, 2021.  
7 Kelly, on the other hand, did not receive payment from AECOM until  
January 3, 2022. Based on this timeline, more than seven days passed  
between when AECOM received payment from PG&E and when it  
paid Kelly.

8 *Id.* at 15, n.10. To summarize, JH Kelly argued that AECOM’s payment was more than seven  
9 days late because AECOM was paid on December 24, 2021 but did not pay JH Kelly until January  
10 3, 2022. *Id.* Seven days from December 24, 2021 would have been December 31, 2021.  
11 AECOM paid JH Kelly on January 3, 2022. From and including Friday, December 31, 2021 to,  
12 but not including Monday, January 3, 2022 is three days. The Court included both Friday and  
13 Monday and arrived at four days. But in any event, nothing about this distinction affected the  
14 Order’s reasoning. Again, the Court considered the full impact of AECOM’s untimely payment  
15 and found it dispositive that “nothing in the waivers or the Subcontract says that untimely payment  
16 renders JH Kelly’s waivers unenforceable.” Order at 13.

17 Finally, JH Kelly contends that “it is unclear from the Court’s Order whether the Court  
18 intended for its ruling to apply to Kelly’s quantum meruit/abandonment claim, which is a claim in  
19 equity seeking the reasonable value of Kelly’s services and the avoidance of unjust enrichment of  
20 AECOM.” Mot. at 5. In response, AECOM says that JH Kelly failed to argue that the  
21 Conditional Partial Lien Waiver cannot be a bar to JH Kelly’s quantum meruit/abandonment claim  
22 because JH Kelly submitted it as a requirement of the Subcontract and cannot do so for the first  
23 time now. Dkt. No. 238 at 11.

24 The Court agrees that JH Kelly did not raise this specific argument in its original brief, and  
25 that alone would be enough to deny JH Kelly’s request to raise it now. *See Arteaga v. Asset*  
26 *Acceptance, LLC*, 733 F. Supp. 2d 1218, 1236 (E.D. Cal. 2010) (“Motions for reconsideration are  
27 not the place for parties to make new arguments not raised in their original briefs.”) (citing

1       *Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925–6 (9th Cir. 1988));  
2       *Gray v. Golden Gate Nat. Recreational Area*, 866 F. Supp. 2d 1129, 1132 (N.D. Cal. 2011)  
3       (same). But JH Kelly did make the broader argument (in another context) that a waiver in a  
4       provision of the Subcontract cannot bar JH Kelly from recovering damages as part of its  
5       abandonment claim, and then included the following footnote that applies that argument to any  
6       other provision of the Subcontract:

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This same argument applies to AECOM’s other motions that are premised on provisions in the Subcontract. Those provisions are not applicable to Kelly’s abandonment claim. To avoid redundancy, Kelly hereby incorporates this argument into its responses to the other motions.

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Dkt. No. 226 at 5, n.5. Read in the light most charitable to JH Kelly, the Court finds that this broad argument arguably (if obliquely) preserved JH Kelly’s present distinction between its legal

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and quantum meruit claims and was not addressed by the Order.

AECOM argues that, in any event, JH Kelly’s argument does not apply to JH Kelly’s claims for labor and materials because JH Kelly waived those claims as part of the lien waivers, which were *not* premised on provisions of the Subcontract. Dkt. No. 238 at 11. The Court will not resolve this issue in the first instance on a motion for leave to file a motion for reconsideration.

The Court accordingly **DIRECTS** both parties to submit by 3:00 p.m. on May 30, 2022, simultaneous supplemental briefs of no more than five pages addressing only whether JH Kelly’s Conditional Partial Lien Waiver also released JH Kelly’s quantum meruit/abandonment claim, accepting the Court’s prior analysis of that Waiver. The briefs must not repeat arguments made in the parties’ prior filings. No further responsive briefs are permitted, and the matter will stand submitted once the parties file their simultaneous briefs.

Other than as to this limited issue (and only barely), JH Kelly’s motion plainly seeks leave to “ask the Court to rethink what it has already thought.” *Gray*, 866 F. Supp. 2d at 1132 (citations omitted). This is improper, and JH Kelly’s request is **DENIED**, except for the question identified above. JH Kelly’s other arguments are preserved for appeal, but the Court has ruled on them and will not reconsider those rulings.

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2 **IT IS SO ORDERED.**

3 Dated: May 29, 2022

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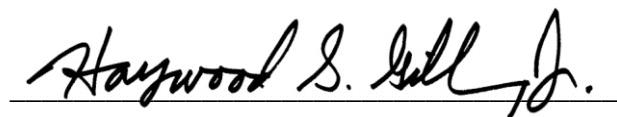
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HAYWOOD S. GILLIAM, JR.  
United States District Judge